IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 2202 of 2007

For Approval and Signature:

HONOURABLE MS.JUSTICE H.N.DEVANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

NILESH RAGHAVJIBHAI BALAR - Applicant(s)
Versus
STATE OF GUJARAT - Respondent(s)

==========

Appearance :
MR ZUBIN F BHARDA for petitioner
MR MR MENGDEY, ADDL. PUBLIC PROSECUTOR for Respondent : 1
MR AD SHAH for Respondent : 1

==========

CORAM : HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 26/11/2007

ORAL JUDGMENT

1. By this petition under Articles 226 and 227 of the

Constitution of India and section 482 of the Code of Criminal Procedure, 1973 (the Code) the petitioner challenges the order dated 29th October, 2007 passed by the learned Sessions Judge, Amreli whereby Criminal Miscellaneous Application No.74/2007 filed by the petitioner praying for transfer of Sessions Case No.93/06 from the Court of the Second Fast Track Judge, Amreli to any other Court hearing Sessions cases, has been rejected.

2. The facts of the case stated briefly are that the petitioner is the original accused No.4 in Criminal Complaint registered as Damnagar Police Station I CR No.28/2006 for the offences punishable under sections 302, 323, 540, 201 and 34 of the Indian Penal Code (IPC). The said offences being solely triable by the Court of Sessions, the learned Magistrate committed the same to the Sessions Court, Amreli where it was registered as Sessions Case No.93/2006. The said case was made over to the 2nd Fast Track Court, Amreli for hearing and final disposal thereof.

3. It is the case of the petitioner that the conduct of the learned 2nd Fast Track Judge (hereinafter referred to as the Presiding Officer) during the course of proceedings of the case in question has created an impression in the mind of the petitioner and the other accused that the learned Presiding Officer was not acting impartially and apprehending that they will not get a free and fair trial, the petitioner filed the above referred application before the learned District and Sessions Judge, Amreli praying

for transfer of the said case to any other court competent to try the case. By the impugned order dated 29th October, 2007 the learned Sessions Judge rejected the application giving rise to the present petition.

4. Heard Mr. Zubin F. Bharda learned Advocate for the petitioner, Mr. M.R. Mengdey learned Additional Public Prosecutor for the respondent No.1 State of Gujarat and Mr. A.D. Shah learned Advocate for the original complainant.

5. Mr. Bharda learned Advocate for the petitioner drew the attention of the Court to the various averments made in petition to substantiate his plea for transfer of the case to another Court. It was submitted that from the averments made in the petition it is amply clear that there is a strong basis for the apprehension of the petitioner that they will not get a fair and free trial. Attention was particularly drawn to the averment that the petitioner had submitted an application in Sessions Case No.93/2006 stating that he was even prepared to remain in jail as an under trial prisoner but did not intend to be tried by the said Presiding Officer.

5.1 Assailing the impugned order passed by the learned Sessions Judge, Learned Advocate for the petitioner submitted that the learned Sessions Judge has ignored the assertions made in the application and by making certain observations upon the conduct of the petitioner as well as co-accused, rejected the application for transfer despite the fact that gross and serious

allegations were levelled in the application against the conduct, attitude and the practice adopted by the Presiding Officer. The fact that the application was filed on 17.3.2007 and disposed of on 29.10.2007 was cited as a ground for strengthening the case of the petitioner that the learned Sessions Judge also was of the opinion that the trial of the Sessions case should be transferred to another Fast Track Court.

5.2 It was further submitted that the learned Sessions Judge has not assigned any cogent reasons for transferring the case to another court. It was also submitted that perusal of the impugned order shows that the learned Sessions Judge has not even made an attempt to inquire into the veracity and truthfulness of the allegations levelled by the petitioner and by making vague observations has rejected the application resulting in serious prejudice to the petitioner and the other accused. It was, accordingly urged, that the petition be allowed by setting aside the impugned order and transferring Sessions Case No.93 of 2006 before any judge other than the 2nd Fast Track Judge, Amreli.

5.3 In support of his submissions the learned Advocate placed reliance upon the decision of the Apex Court in the case of ***Gurcharan Dass Chadha v. State of Rajasthan*** (AIR 1966 SC 1418) wherein it has been held as follows:

"A case is transferred if there is a reasonable

apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge of the reasonableness of the apprehension the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained, but must appear to the Court to be a reasonable apprehension."

6. Mr. M.R. Mengdey learned Additional Public Prosecutor supported the impugned judgement and order and submitted that the said order was a well-reasoned order and was in consonance with the provisions of law as well as the decisions of the Supreme Court in this regard. It was accordingly urged that the petition being devoid of merit be dismissed.

7. Mr. A.D. Shah learned Advocate for the original complainant referred to the allegations made in the petition to submit that the nature of the grievance raised therein was more of a grievance of the advocate against the court. It was submitted that nothing has been pointed out to show that the learned Presiding Officer bore any grudge or bias against the petitioner and other accused. Learned Advocate further pointed out that one of the witnesses was residing abroad and the trial was intentionally being delayed on one ground

or the other, presumably to cause harassment to the said witness. It was further pointed out that no case had been made out for transfer of the case to any other judge and that the learned Sessions Judge had rightly rejected the application made by the petitioner. It was accordingly urged that the petition be dismissed.

7.1 In support of his submissions the learned Advocate placed reliance upon the decision of the Apex Court in the case of ***Maneka Sanjay Gandhi v. Rani Jethmalani*** (AIR 1979 SC 468) and in the case of ***R. Balakrishna Pillai v. State of Kerala*** (AIR 2000 SC 2778).

8. In the case of ***R. Balakrishna Pillai*** (supra) the Supreme Court held as follows:

"10. *Further, the contention raised by the learned Counsel for the petitioner that one of the Judges of the Bench was appointed and has worked as an Advocate to assist Justice K. Sukumaran Commission to inquire into malpractices in the execution of the rectification work in Hydro Electric Project called Edamalayar Project and, therefore, the petitioner is not likely to get justice if the appeal is decided by the said Bench, deserves to be rejected. It is true that one of the principles of the administration of justice is that justice should not only be done but it should be seen to have been done. However, a mere allegation that there is apprehension that justice will not be done in a given case is not sufficient. Before transferring the case, the Court has to find out whether the apprehension appears to be reasonable. To judge the reasonableness of the apprehension, the state of the mind of the person who entertains the apprehension the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must appear to the Court to be a reasonable, genuine and justifiable. In the present day scenario, if these types of*

applications are entertained, the entire judicial atmosphere would be polluted with such frivolous petitions for various reasons. Dealing with the transfer petition, this Court in Maneka Sanjay Gandhi v. Rani Jethmalani, (1979) 2 SCR 378 : AIR 1979 SC 468 : (1979 Cri LJ 458), observed (Para 2) :-

"*Assurance of a fair trial is the first imperative of the dispension of justice and the central criterion for the Court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touch-stone bearing in mind the rule that normally the complainant has the right to choose any Court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from the angle the Court may weigh the circumstances.*"

11. Applying the aforesaid principles in deciding the Transfer Petition, in our view, it requires to be rejected firstly because the petitioner is not convicted on the basis of the said inquiry report. The charges against him are all together for a different case not connected with the rectification work of Edamalayar Project. Secondly, a Judge while practicising as an Advocate might have appeared in a number of cases, but that would not mean that he would have any personal interest or connection with the said matters or with persons involved therein and would be biased towards them. Therefore, it would be difficult to presume or to draw an inference that the learned Judge, because of assisting the Commission of Inquiry as an Advocate in different matter, would have bias or prejudice against the petitioner and would not render justice in accordance with law. Acceptance of such contention would seriously undermine the independence and stern stuff of the Judges”.

9. Applying the principles enunciated by the Supreme Court in the decisions cited hereinabove to the facts of the present case; this Court is of the view that the learned Sessions Judge has rightly rejected the transfer application. From the averments made in the petition as well as the application made before the learned Sessions Judge, it is apparent that the allegations made therein are vague and general in nature. The averments made in the petition lend credence to the submission of the learned Advocate for the complainant that the grievance appears to be that of the advocate against the learned Presiding Officer rather than that of the petitioner. As held by the Apex Court in the case of ***Gurcharan Dass*** (supra) a mere apprehension that justice will not be done in a given case does not suffice, the Court has further to see whether the apprehension is reasonable or not. To judge of the reasonableness of the apprehension the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained, but must appear to the Court to be a reasonable apprehension. In the facts of the present case, upon an overall view of the matter the apprehension voiced in the petition does not appear to be reasonable. The main allegations levelled in the transfer application are that the learned trail Judge has issued threats to the learned Advocate appearing for the petitioner and other accused in pursuance of previous encounters which the learned Advocate for the petitioner had with the Learned Presiding Officer in connection with some incident that had occurred when

the Presiding Officer was discharging duties as a Government Pleader at Rajkot. The other allegation is that the Presiding Officer has threatened a co-accused in connection with a compliant received regarding witnesses being threatened by him though he was in jail. The first allegation clearly appears to be more of a grievance of the learned Advocate appearing on behalf of the petitioner in the Sessions Case. The other allegation also is misconceived. The learned Presiding Officer may have warned the concerned accused in respect of witnesses being threatened by him. It may be that a person may be in jail, but witnesses can also be threatened indirectly. Hence, if the learned Presiding Officer has warned the said accused in respect of any witness being threatened as alleged, no fault can be found with the conduct of the learned Presiding Officer.

10. The allegation regarding the Chief Government Pleader having filed his appearance for the prosecution is also misplaced. The appointment of a prosecutor is a prerogative of the prosecution, and if the petitioner has any grievance against the same, his remedy lies elsewhere. But that is no ground for seeking transfer of a case. As held by the Apex Court in the case of ***R. Balakrishna Pillai*** (supra) “a Judge while practicising as an Advocate might have appeared in a number of cases, but that would not mean that he would have any personal interest or connection with the said matters or with persons involved therein and would be biased towards them. Therefore, it would be difficult to presume or to draw an inference that the learned Judge,

because of assisting the Commission of Inquiry as an Advocate in different matter, would have bias or prejudice against the petitioner and would not render justice in accordance with law. Acceptance of such contention would seriously undermine the independence and stern stuff of the Judges". The aforesaid decision applies on all fours to the present case. Merely because the learned Presiding Officer was at some point of time working under the Chief Government Pleader, is no reason to assume that Presiding Officer would be biased in his favour or would be otherwise affected by his presence. Entertaining such frivolous applications based on vague allegations would seriously undermine the morale of the subordinate judiciary.

11. As regards the contention that the learned Sessions Judge has not even made an attempt to inquire into the veracity and truthfulness of the allegations levelled by the petitioner, upon perusal of the impugned order dated 29th October, 2007, it is apparent that the learned Sessions Judge has called for remarks from the learned Presiding Officer and after considering the same has come to the conclusion that the allegations made against the Presiding Officer are baseless. In the circumstances, the said contention also does not merit acceptance. A perusal of the impugned order also shows that the learned Sessions Judge has assigned sufficient and cogent reasons in support of the findings recorded by him.

12. For the foregoing reasons no infirmity can be found with

the impugned order dated 29th October, 2007 passed by the learned Sessions Judge, Amreli so as to call for any intervention by this Court.

13. In the result, the petition fails and is accordingly rejected. Rule is discharged with no order as to costs.

[HARSHA DEVANI, J.]

parmar*